IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 435 OF 1980

Madhu Fantasy Land Pvt. Ltd. & Ors. ... Plaintiffs.

V/s.

Nargish Maneckji Mody & Anr. ... Defendants.

Mr. Prakash Gunwani along with Mr. Manoj Dalvi i/by M/s. Banatwala & Co. for the plaintiffs.

Mr. Pravin Diwan along with Mr. Anjal Amin i/by M/s. b. Amin & Co. for defendant No.3(b).

Mr. Girish Desai i/by M/s. Husseini Doctor & Co. for defendant No.1A.

Mr. U. J. Makhija along with Mr. Munjee i/by M/s. Mulla and Mulla for defendant No.2.

CORAM : ANOOP V. MOHTA,J.

DATED : 25th April, 2007

ORAL JUDGMENT:-

This is a suit filed by the plaintiffs basically seeking a decree for specific performance of an agreement for sale dated 22nd September, 1977, and alternative prayers are; the first defendant be ordered and decreed to pay to the plaintiffs a sum of Rs.68,126/- (Rupees Sixty eight thousand one hundred twenty six only) with further interest on Rs.50,001/-

(Rupees fifty thousand one only) (earnest money) at the rate of 15% per annum from the date of the suit till the payment of realisation. The plaintiffs have also claimed for damages for the breach of contract. There are other prayers arising out of the said agreement.

2. By an agreement for sale dated 22nd September, 1977 the original defendant (Defendant No.1) agreed to sell the said property to the first plaintiff for a sum of Rs.4,10,001/- (Rupees four lacs ten thousand one) on the terms and conditions mentioned in the said sale deed. On the execution of the said agreement for sale, plaintiff No.1 paid a sum of Rs.50,001/- (Rupees fifty thousand one only) to defendant No.1.

3. There are various issues framed in the matter. Those are:-

a. Whether the plaintiffs are entitled to maintain the above suit?

b. Whether plaintiff proves that the original 1st Defendant had executed the Agreement for Sale dated 22/09/1977 as alleged in paragraph 4 of the plaint and if so whether it is valid and subsisting?

c. In the alternative whether the Plaintiffs are entitled to the

specific performance of the Agreement for Sale dated 22nd September, 1977?

d. Whether the Original Defendant No.1 Dina Maneckji Mody had any right, title or interest in the suit property to assign or convey the same in favour of the Plaintiffs as alleged?

e. Whether the Plaintiffs are entitled to claim to the Defendants Rs.5,00,000/- by way of damages and also a further sum of Rs.50,000/- together with interest thereon at the rate of 15% p.a. as alleged?

f. Whether the Plaintiffs are entitled to any charge on the suit property for the recovery of the above amounts or any part thereof as alleged?

g. What reliefs the plaintiffs are entitled for?

4. The parties have led evidence in support of their rival contentions. The defendants have not pressed issue Nos. (a),(b),(d) and (f).

5. After hearing both the parties, I am considering the present suit on the foundation of basic principle for grant of specific performance based on the agreement between the parties. I am acceding to the submission of the learned counsel for the defendants that the suit contract was terminated automatically,

as per the terms and conditions, after four months from the date of agreement for sale i.e. 22nd September, 1977 because of non compliance and non performance of respective obligations by the parties, therefore, without going further into the merits of the other issues, the suit can be disposed of accordingly. The specific performance as prayed is difficult to order in view of lapse of time and as the contract itself was terminated, because of admitted refusal from the statutory authority, the Bombay Port Trust (for short, "BPT") constituted under the Major Port Trust Act-1963 as amended by Major Port Trust Act-1974.

6. The relevant clauses of the agreement are:-

> "17. The vendor undertakes to make an application to the Bombay Port Trust and the Competent Authority under the Urban Land Ceiling Act within one month from the date hereof, and agree to sign writing or writings in that behalf as may be necessary and true copy of such writing or writings shall be given by the purchasers before taking signature of the Vendor. The purchasers shall on behalf of the vendor pursue the said application and prior to the completion of sale obtain in favour of the purchasers or their nominees consent from the Trustees of the Port of Bombay and the Competent Authority under the Urban Land Ceiling Act for assignment

and/or transfer of the said property to the name of the Purchasers or their nominees, at the costs of the Purchasers within four months from the date of the first application. Likewise the purchasers shall comply with the carry out the necessary reasonable conditions that may be made by the said Authorities for according their consent to the sale at the costs charges and expenses of the purchasers.

18. The sale shall be completed within one month from the date of intimation of sanction of the Trustees of the Port of Bombay and the Competent Authority to its sale. If the required sanctions as stated in clause 17 above are not received, then the Agreement will be treated as cancelled and the amount of earnest money will be returned by the vendor to the purchasers without interest and/or costs, compensation.

22. The time mentioned in various clauses of this agreement shall be the essence of the Agreement."

7. Based on these term and conditions the vendor i.e. defendant No.1 filed an application before BPT within one month for the consent to the proposed assignment. The proposed purchaser i.e. plaintiff Nos. 2 and 3 had been empowered to peruse the said application. Admittedly, by letter dated 14th May, 1979 the Legal Department of the BPT communicated defendant No.1 of their refusal to accord its consent to the proposed assignment. Defendant No.1 based on the said refusal had informed to plaintiff No.1 of the said refusal and

returned a cheque of Rs.50,001/- (Rupees fifty thousand one only) being the earnest money deposited with defendant No.1. By the said letter terminated the contract in question.

8. There is no dispute about this refund of earnest money. It was communicated by notice dated 2nd June, 1979 to the advocate, along with a cheque. The plaintiffs through the advocates notice dated 2nd June, 1979 returned the said cheque of Rs.50,001/- (Rupees fifth thousand one only). Defendant No.1, therefore, again returned the same cheque of Rs.50,001/- (Rupees fifty thousand one only) and reiterated that the agreement dated 22nd September, 1979 had been terminated already.

9. Its undisputed position makes it very clear that the BPT did not give permission for the assignment of the lease in favour of the plaintiffs, as that was the essential condition of the terms and conditions of the agreement for sale.

10. This being on the basic requirement of the terms and conditions in view of Clauses 17 and 18 as referred above and as sale could not have been

completed for want of intimation of sanction from the BPT. As referred above, defendant No.1 after treating the same agreement cancelled, admittedly, sent the cheque to returned the earnest money. In this background the submission as raised by the plaintiffs counsel based on the letter dated 23rd August, 1979 whereby it was informed to defendant No.1 by BPT, that they had granted sanction to the proposed assignment in favour of plaintiff Nos.1 and 2 subject to certain conditions has no substance and cannot be accepted.

11. Admittedly, a reference was made of the letter dated 24th May, 1979 by the BPT in the said letter dated 23rd August, 1979 which was issued by defendant No.2 to defendant No.1. By letter dated 3rd September, 1979 defendant No.1 expressed surprise and ascertained that there was no such letter dated 24th May, 1979 issued or sent by defendant No.1 for review of the earlier order of refusal of sanction. Defendant No.1 had confirmed that they had returned the earnest money twice to the plaintiffs based on the basic refusal order. It appears that at the instance of plaintiffs, the attorney of defendant No.2 requested to reconsider the said refusal order. Based on that, BPT had refused to reconsider, and to grant a

sanction of assignment after the termination of the contract. Admittedly, the terms and conditions of the agreement between the parties nowhere authorized the plaintiffs to modify or file such review application on behalf of defendant No.1 (vendor) after the receipt of the basic refusal order from BPT. There was no such authority given even otherwise or in such purpose, by the plaintiffs/ purchasers or their nominees except to pursue the said application before the competent authority. Apart from this, there is nothing on record to state that there is any agreement between the parties, after the automatic termination of the contract between the parties in view of the Clause 18 as reproduced.

12. The submission, therefore, that in the facts and circumstances of the case, within a reasonable time as BPT had reconsidered and granted the said sanction cannot be accepted for a simple reason that the parties are entitled to the specific performance of the contract based on the terms and conditions of the agreement for sale and not otherwise. Admittedly, there was no extension of such time as referred in Clause 17 or 18. Defendant No.1 (vendor) never agreed to waive or consent for any such further sanction from

the BPT. On the contrary, defendant No.1 had returned the earnest money and treated the said agreement as cancelled. Once the agreement is cancelled, it is difficult now to pass any order to review the said agreement, basically when one of the parties has not accepted to revive the original agreement in question.

13. In the present case, admittedly a sanction from the BPT was a basic condition. Parties were fully aware of those terms and conditions. Admittedly, there was no default or inaction from defendant No.1 to perform the part of his obligation basically in moving the application to the competent authority and BPT defendant No.2. Plaintiffs were, however, aware that the same would be completed only after the receipt of the intimation of sanction in question and not otherwise. On the contrary, it is specifically agreed in Clause 18 that the required sanction as stated in Clause 17 was not received though their agreement would be treated as cancelled and the earnest money need to be returned by the vendor to the purchaser without costs and compensation.

14. A submission that there was no reason assigned by

the BPT is not to the proposed assignment and therefore, the refusal of sanction needs to be considered as a foundation for their prayer which is also not tenable. Once the contract is terminated, and one party is refused to waive any condition, and in fact acted and informed to the concerned authorities about the automatic termination of the contract, and to refund the earnest money even though defendant No.2 BPT cannot compel defendant No.1, to accept the sanction as a valid sanction. Defendant No.2 BPT has nothing to do with the terms and conditions between the agreement of plaintiffs and defendant No.2. Defendant No.1, therefore, in view of this admitted position the parties can be compelled to perform the obligation based on the contract which was terminated automatically for want of necessary permission/ sanction as referred above.

15. The specific performance of contract in immovable property, though time is not an essence of the part of contract, still if parties agreed and acted upon accordingly. There was no default on the side of the party. In the present case, vendor - the plaintiff/ purchaser cannot compel the said party to perform his obligation, after the lapse of practically 35 years.

There is no bar to grant such specific relief if the case is made out. The foundation of such relief is as reiterated by various courts is agreement between the parties and the circumstances surrounding the same. The discretion of the Court in such matter just cannot be used in the fact and circumstances of the case in favour of the plaintiffs. The issue No.(c) is answered in negative.

16. Taking all this into account without going into the merits of the matter, I am of the view that there is no case made out by the plaintiffs to grant a decree of specific performance based on the agreement in question.

17. Having once come to the particular conclusion as referred above, I am of the view that all issues related or arising out of the said agreement need no further elaboration are answered in negative.

18. The submission of the learned counsel appearing for the plaintiffs that in view of the fact that there was no default on their part and they suffered mentally and physically by pursuing the authority for getting the sanction and therefore, in view of their

submission they are at least entitled to the damages to the tune of Rs.5,00,000/- (Rupees five lacs only) for breach of contract. In the facts and circumstances of the case as referred above, it is difficult to accept. There is no question of damages as prayed, for the breach of the contract. This is not the case where one of the vendors has committed any breach. The automatic termination of the contract for whatever may be the reason, there is no foundation for the claim of damages by the purchaser from the vendor, specially when there is nothing to support that breach was committed by the vendor. The issue (e) of damages is answered in negative.

19. As the earnest money admittedly is lying with the estate of the original defendant No.1, the submission of learned advocate for defendant that having once tender the earnest money. Even as per Clause 18 of the agreement between the parties, the plaintiffs is not entitled to any interest on the said money. There is no dispute that the said amount was twice returned back by defendant No.2. However, considering the fact that the said amount is still lying with the estate of the original defendant No.1, I am of the view that the plaintiff is entitled for the interest on the said

amount at the rate of 9% p.a. from the date of its receipt. As there was not much debate raised even by the learned counsel for the defendants on this aspect. The issue No.(e), therefore, partly answered in favour of plaintiffs.

20. The plaintiffs have claimed the earnest money i.e. Rs.50,001/- (Rupees fifty thousand one only) alongwith the interest at the rate of 15% p.a. from 22nd September, 1977 to 25th February, 1998 i.e. Rs. 18,125/- (Rupees eighteen thousand one hundred twenty five only) and thereby claimed total amount of Rs.68,125/- (Rupees Sixty eight thousand one hundred twenty five only).

21. In the facts and circumstances of the case, I am inclined to grant the relief apart from that the earnest money of Rs.50,001/- (Rupees fifty thousand one only) and interest at the rate of 9% per annum on 50,001/- (Fifty thousand one only) from 22nd September, 1977 to 25th February, 1998. The plaintiffs had further entitled for interest at the rate of 9% per annum from the date of the suit till the realisation.

22. Hence the suit as prayed in Clause (a), (b), (b-ii), (c), (d) and (e) is rejected and accordingly dismissed.

b) As regards the alternative prayer clause (a) (b-i), the suit is partly allowed. Defendant No.1 should pay/ return a sum of Rs.50,001/- (Rupees fifty thousand one only) with interest at the rate of 9% per annum from 22nd September, 1977 to 25th February, 1998 and further interest of 9% per annum on the said amount of Rs.50,001/- (Rupees fifty thousand one only) till the realisation.

c) In the facts and circumstances of the case, no costs.

[ANOOP V. MOHTA, J.]